

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20358
Docket Number CL-20298

Irwin M. **Lieberman**, Referee

(Brotherhood of Railway, Airline & Steamship
(Clerks, Freight Handlers, Express and
(Station **Emploves**
((Formerly **Transportation-Communication** Division, **BRAC**)

PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of the General **Committee** of the **Transportation-Communication** Division, **BRAC**, on the Norfolk and Western Railway (Lake Region), GL-7316, that:

1. Carrier violated and continues to violate the Agreement between the parties when, **commencing** August 11, 1971, it requires and permits trainmen and other **employees** to use the telephone for the purpose of blocking trains and handling train orders at stations or locations as hereinafter shown.

2. Carrier shall compensate G. A. Leeth, Operator at Canton Yard, a **two** hour call payment in accordance with Paragraph (A) of Mediation Agreement of February 23, 1962, for each occurrence that **trainmen** use the telephone for the purpose set forth above at Canton Yard, commencing August 11, 1971.

3. **Carrier** shall also compensate the first-out, idle extra telegrapher, or the senior idle telegrapher observing his rest day in case no extra telegrapher is idle, payments in accordance with Paragraph **(D)** of Mediation Agreement of February 23, 1962, for occurrences at locations other than Canton Yard **where** trainmen or other employees use the telephone for the purpose set forth above, **commencing** August 11, 1971.
CARRIER DOCKET TC-CAN-71-3 COMM. DOCKET c-71-9

OPINION OF BOARD: Prior to August 11, 1971 Carrier had maintained three **seven** day telegrapher positions at its Canton Yard. These positions included the responsibility for using the telephone for relaying instructions to block trains, handle train orders and other messages involving train movements throughout the Canton Terminal. **This** activity was **all** under the instruction of the Yardmaster who had the responsibility under Time Table Rules for **all** such movements. This manner of operating had **begun** in January 1932 when the Operators were instructed by Carrier to relay the Yardmaster's instructions to the appropriate train crews, and continued uninterrupted until August 11, 1971. On that date Carrier abolished the second, third and relief Operator positions at Canton Yard and reduced the first shift position to six days per week, with assigned hours of 7:00 A.M. to 4:00 P.M. Thereafter the first Shift Operator

continued to function as in the past **issuing instructions** by telephone to train crews with authority for movements within the **Terminal**; for all **train movements** outside of the Operator's assigned hours the **Yardmasters** issued instructions by telephone to the train **crews**. This latter activity is the basis of the dispute herein.

The Petitioner relies principally **on** Rule 26 which deals **with** handling of train orders, but also cites Rule 1 and the **Mediation** Agreement of **February** 23, 1962. Those rules read as follows:

"RULE 1 - SCOPE

This agreement will **govern** the **working** conditions and rates of pay of telegraphers, agents, telephone operators (except telephone switchboard operators), agent-telegraphers, agent-telephoners, manager-telegrapher, telegrapher-clerks, **levermen, towermen, tower and** train directors, block operators, staffmen, operators of mechanical telegraph machines, and other combined classifications listed in the accompanying wage scale, **all** of whom are hereinafter referred to as '**employees**'."

"RULE 26 - HANDLING TRAIN ORDER

It is not the disposition of the Railroad to displace **employees covered** by this **agreement** by having **trainmen** or other **employees** operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in **communicating** with the operator."

"MEDIATION AGREEMENT OF FEBRUARY 23, 1962

In the application of Rule 26 it is agreed when such service is performed **on** any day by an **employee not** covered by this agreement (except Train Dispatchers) the **following** shall apply:

(a) At a station or location where telegraphers are employed, a call (Rule 5) will be paid to the off-duty telegrapher assigned at the location whose tour of duty is nearest (either **beginning** or ending) to the **time** of the occurrence **and** at one **man** stations such call shall be paid to the telegrapher assigned thereto.

* * * * *

"(d) At a location where a **telegrapher** position has never been established the first-out extra telegrapher shall be allowed three (3) hours' pay at the minimum telegrapher's rate for each occasion except if **two** or more occurrences are **within** a three (3) hour **period**, only three (3) hours' pay **will** be allowed. If this occurs on **more than** three (3) days at any location **in** any period of **seven** (7) consecutive days **commencing 12:01** AU each Monday, a **minimum** of eight (8) hours' pay for each day shall be allowed. If no extra telegrapher is idle on that date then payment shall be allowed to the senior idle telegrapher who is observing his rest day on that date.

It is further agreed that the minimum telegrapher's rate for the purposes of applying Articles (B), (C) and (D) of this agreement is \$2.425 per hour.

NOTE: The above provisions shall not apply under emergency conditions defined as follows:

Severe weather disturbances; unforeseen track conditions or obstructions; failure of fixed signals; engine or equipment failures which **interfere** with the normal operation of trains; unusual delays which could not have been foreseen when train was at previous telegraph office; casualties; accidents; or any unforeseen situations arising where life or property may be in jeopardy requiring **immediate** attention, which could not have been anticipated when train was at previous telegraph office."

Petitioner's arguments are based in part on the proposed Award of Public Law Board No. 431 **and** the settlement of the cases before that Board in the agreement reached on August 18, 1970. The settlement of Case No. **1** of that docket sets forth that: "Carrier is violating the Rules L (Scope), 2 (A) and 26 **of** the Telegrapher's Agreement by requiring and/or permitting employees not covered thereby to operate the telephone at **Mingo** Yard, Ohio, for the purpose of sending and/or receiving messages." With respect to Rule 26, **Petitioner** argues:

'Rule 26, is **clear** and free of **ambiguity**. It provides that the **Carrier** will not displace employees covered by the Agreement by having trainmen or other employees operate the telephone for the purpose of blocking **trains**, handling train **orders** or messages. It also provides that this does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in **communicating with THE OPERATOR**. **For** more than forty years the parties have recognized that the

"**use** of the telephone by trainmen within the Canton Terminal to communicate with the Operator at Canton Yard, was within the exception of Rule 26. But, it is clearly in violation thereof when the trainmen **use** the telephone **for** the purpose of blocking trains **in communicating** with the yardmaster. If this were not the case, this work would not have been assigned to the Operators at Canton Yard **more** than two decades ago."

Carrier presents a number of argument.⁹ **to** justify its actions. First, Carrier states that the work in question is usually and historically **performed** by Yardmasters, is not work belonging exclusively to operators, and is not work reserved to Operators by the Scope Rule. **Carrier further** urges that the proposed Awards in Public Law Board No. 431 were never adopted and should be ignored and further that the Awards in Public Law Board No. 782 dealing with a related issue and the same parties should not be considered since they deal with a holiday question and may be distinguished from this dispute. Carrier argues that the **movements** involved in this case are all within the **Terminal** Yard limits under the complete authority of the Yardmaster and no road territory movements are involved. **Carrier** states that the decrease in yard activity **made** it both feasible and economical in August of 1971 to **eliminate** the second and third **trick** and relief operator positions at the Canton Yard; this simply **r-ed** the unnecessary intermediate positions which relayed **verbal** yard **movement** instructions from the **Yard-**masters to crews of yard engines or trainmen.

Both parties to this dispute have submitted numerous **Awards** in support of their arguments. A study of these Awards does not reveal a consistent pattern of reasoning which supports either position; either the Awards deal with tangential issues or **are** in diametric opposition. (e. g.: Award 13222 versus Award 11667) In view of the history of the dispute on this property in previous cases, we believe **it** would be appropriate to evaluate this case on its merits, since there are no clear specific controlling precedents.

The Scope Rule in the Agree-t is general and would under most circumstances require proof that the work **involved** has been performed **histor-ically and** customarily system-wide by **employees** covered by the Agreement, to establish exclusivity. In this dispute, however, Rule 26 is a special Rule which supercedes the Scope Rule with respect to the issues in dispute, **thus** making system-wide proof unnecessary. Rule 26 contains language which seems **abundantly** clear and unambiguous; the last sentence in particular applies to the issue in dispute. The Carrier appears to agree with the Organization's interpretation by virtue of the language agreed to in the

settlement of Case No. 1 of the docket assigned to Public Law Board No. 431, which is quoted above. Furthermore, Carrier has made assertions but has presented no evidence whatever to support its contention that trainmen and **yardmen** have always used the telephone to obtain instructions from the Yardmaster **as to** their movements in yard limits, not only at Canton but at other yards. To the contrary, the only evidence contained in the record supports the thesis that at Canton and at least at **Mingo** Yard such was not the case.

Carrier argues that in the activity of the Operators there was no 'blocking' of trains; we do not find that this distinction is significant in view of the language of Rule 26 which contains the word "messages". We concur in Carrier's position that the Mediation Agreement of February 23, 1962 does not interpret Rule 26; in our view **it** provides **implementing** language for Rule 26.

Carrier argues that Part 3 of the Claim should not be allowed since Carrier should not be required to develop Claims for unnamed Claimants on unspecified dates through a check of its records. The thesis **is** correct but it is only partly applicable to this dispute. **This** dispute comprises a continuing claim and as such does not require specificity beyond that provided **in** the original documents handled on the property. **However** the phrase "...for occurrences at locations other than Canton Yard where trainmen or other employees use the telephone for the purpose set forth above...." is too open **ended** and vague. Part 3 of the Claim must be restricted to those locations other than Canton Yard specified in the letter dated September 1, 1971.

Our conclusion **therefore** is that the Claim **must** be sustained. **Carrier** may not with **impunity** re-work which is reserved to employee covered by the Agreement and assign such work to other non-agreement **employees**. Although we can understand and sympathize with the desire of Carrier to **reduce** its overhead in the face of decreasing traffic, it can do so only within the bounds of the Agreement - or by agreement with the Organizations involved.

FINDINGS: The Third Division of the **Adjustment** Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June **21**, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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That the Agreement was violated.

A W A R D

Claim sustained with the prwiso indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By ~~Order~~ of Third Division

ATTEST : A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of August 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20358 -
DOCKET NO. CL-20295 - REFEREE LIEBERMAN

The operations within a yard, as here involved, are under the direct supervision of a yardmaster. **This** is distinguished from train orders issued by train dispatchers governing train movements **on** line of road.

Also, it is abundantly clear from the record that **messages - which** is not even mentioned in the "Statement of Claim" - did not constitute "**messages of record**" as that term is commonly understood in railroad **usage** and the **employees** were unable to show that the transmission of this type of message, which would not be involved in yard operations as reiterated **many** times by the Carrier in this record, was by history, custom and tradition reserved exclusively to **telegraphers**.

In this case, **the** operators merely assisted the **yardmaster** and the **organization** itself admitted he was the authority.

The issuance of verbal instructions to train **and** yard crews for movements within yard **limits** is a historical function of **yardmasters**, and the only function of the operators, whose positions were abolished, was to assist the **yardmasters** in this work until, due to diminished train and yard movements, such assistance was no longer necessary.

We have **many** we'll-reasoned and sound Awards as to the right of the Carrier to abolish positions.

The majority erred in **this** Award and no **precedential** value **whatsoever** can be attached to the Award.

We dissent.

H. F. M. Braidwood
H. F. M. Braidwood

P. C. Carter
P. C. Carter

W. B. Jones
W. B. Jones

G. L. Naylor
G. L. Naylor

G. M. Youhn
G. M. Youhn

Serial No. 278

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 20358

DOCKET NO. CL-20298

NAME OF ORGANIZATION: Brotherhood of Railway, Airline & Steamship Clerks,
Freight Handlers, Express and Station Employees
(Formerly Transportation-Communication Division, BBAC)

NAME OF CARRIER: Norfolk and Western Railway Company (Lake Region)

Upon application of the **representatives** of the **Employees involved** in the above Award, that this Division interpret **the same** in light of the **dispute** between the **parties** as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The **request** made for interpretation in this dispute involves the question of the continuing liability of **Carrier and whether** or not **such** liability **was** terminated by the new Agreement entered into effective April 1, 1973. Additionally, the Organization **is raising**, for the **first** time, the issue of interest on the **sums** due to the **various** Claimants. The Organization also insists that Carrier has been dilatory in complying with the Award and Order in this dispute. On the latter point, it **must** be noted that although this Board has no enforcement authority, prompt compliance with awards is always expected.

Petitioner argues that the new 1973 Agreement did not change the basic work relative to train orders and **messages** but merely provided for interchange between **clerks** and **telegraphers**. It is contended that Carrier's practice **is** a violation of the April 1973 Agreement as well as the **previous Agreement** with respect to the work at **issue** in **this** case. The Carrier argues that **Rule 26** in the old Agreement has been replaced by **Rule 66** which **is** significantly different and hence the liability of Carrier was terminated effective April 1, 1973.

The new Agreement, by its terms, **Rule 70**, superceded all former Agreements. An examination of **Rule 66** indicates that it pertains to the handling of train orders and clearance forms whereas the **Rule** in the previous Agreement pertained to employees operating the telephone "...for the purpose of blocking trains", handling train orders or **messages**. "We deem this new language to constitute a material departure from that contained in the former Agreement since it deals only with train orders and clearance forms. In the light of the reasoning expressed in the Award herein, it **must** be concluded that Carrier's liability terminated on April 1, 1973. For this reason Carrier is not required to restore the work to employees, except insofar as it may be required by the April 1, 1973 Agreement but **is** required to .

make the employees whole **as** provided **in** the Award (up to April 1, 1973). Although **we sympathize with** the request for prompt compliance with our Award, **we** cannot authorize the **payment** of interest **as** a **pressure** device or **for any other** purpose **under the** term of the applicable **Agreements** (See Awards 18433, 19336, 19744 and **many others**).

Referee Irwin M. Lieberman, who sat with the Division, **as** a neutral **member, when** Award No. 20358 **was** adopted, also participated with the Division **in** making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

ATTEST: *A. M. Paulsen*
Executive Secretary

Dated at Chicago, **Illinois**, this 29th day of August 1975.